

File



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

Application of John Altmann for a Permit to
Construct a Clear-Span Bridge Across the White
River, Town of Kelly, Bayfield County, Wisconsin

Case No. 3-NO-97-04007

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

John Altmann applied to the Department of Natural Resources for a permit to construct a bridge across the White River in Bayfield County, Wisconsin. The Department of Natural Resources issued a Notice of Proposed Bridge which stated that unless written objection was made within thirty days of publication of the notice, the Department might issue a decision on the permit without a hearing. The Department received several timely objections to the permit application. On September 21, 1998, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

Pursuant to due notice a hearing was conducted on October 29, 1998, in Washburn, Wisconsin. Mark J. Kaiser, Administrative Law Judge, presided.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

John Altmann, Applicant, by

Thomas T. Lindsey, Attorney
Spears, Carlson, Lindsey & Anderson
122 West Bayfield Street
P. O. Box 547
Washburn, WI 54891

Wisconsin Department of Natural Resources, by

Michael Scott, Attorney
P. O. Box 7921
Madison, WI 53707-7921

FINDINGS OF FACT

1. In 1989, John Altmann purchased real property located in the NW ¼, SW ¼ of Section 17, Township 46 North, Range 5 West, Town of Kelly, Bayfield County. The parcel purchased by Mr. Altmann is approximately 642 acres in size. Mr. Altmann's property is split by the White River.

2. By application dated April 7, 1997, John Altmann applied to the Department of Natural Resources (Department) for a permit pursuant to sec. 30.123, Stats., to construct a pedestrian bridge over the White River. Mr. Altmann has a cabin on his property on the east side of the White River. The purpose of the bridge is to provide convenient access for Mr. Altmann to his property on the west side of the White River for hunting, fishing and other recreation. Mr. Altmann and the Department have fulfilled all procedural requirements of secs. 30.123 and 30.02, Stats.

3. The White River is navigable in fact at the site of the proposed bridge. The White River from the Bibon Marsh to the White River Dam flows through a relatively natural, undeveloped area. The stretch of the White River which flows through Mr. Altmann's property is characterized by steep banks with brush and trees right up to the banks. The area is scenic with few man made structures visible on the banks. The White River is a popular canoeing river and is a class II trout stream.

4. Presently John Altmann has access to his property on the west side of the White River by travelling from his driveway south on Beebe Road to Maple Ridge Road; west on Maple Ridge Road across the Maple Ridge Road bridge to Highway 63; north on Highway 63 to Sundeen Road; and west to the end of Sundeen Road. From the end of Sundeen Road, Mr. Altmann then walks a quarter mile, including a 66 foot long easement, to his property. The distance by motor vehicle from Mr. Altmann's cabin to his property on the west side of the White River is approximately 5.5 miles.

It was estimated that the above-described trip takes approximately five minutes by motor vehicle. However, in March, 1998 Mr. Altmann had a portion of his right leg amputated and was fitted with a prosthesis. Mr. Altmann now uses an All Terrain Vehicle (ATV) to get around on his land. Therefore, for him to enjoy his property on the west side of the White River, it is necessary for Mr. Altmann to load his ATV onto a trailer and unload it at the other end. Mr. Altmann estimates that it now takes him 25 minutes to travel from his cabin to his property on the west side of the river.

5. The bridge John Altmann proposes to construct is composed of steel trusses 100 feet in length and six feet in width supported by concrete footings with fifteen foot long, open-style approach ramps. (The concrete footings have already been poured and are in place.) The proposed bridge will have seven feet of clearance above the high water level and it will have treated timber decking and safety railings. The bridge design includes the use of natural colors and is similar to one used by the Department in a state park. Despite Mr. Altmann's efforts to design a bridge which is aesthetically pleasing, the proposed bridge will negatively impact the

natural scenic beauty of the area and is detrimental to the public interest in the White River. The basis of this finding is set forth in the "Discussion" section below.

6. The stretch of the White River which passes through Mr. Altmann's property is approximately five miles long. This stretch of the White River is used by canoeists. The proposed bridge will be visible to canoeist as they travel down the White River. Mr. Altmann provided undisputed testimony that the length of time it would take a typical canoeist to travel from the point at which the canoeist would come around the bend which is immediately upstream from the site of the proposed bridge to the point at which the canoeist would pass beneath the site of the proposed bridge (*i.e.* the time the proposed bridge would be in the canoeist's line of vision) is 42 seconds.

7. The proposed bridge is only intended for the use of John Altmann and his guests. No public benefit will result from the construction of the proposed bridge.

8. The Department also raised concerns about the engineering of the bridge. The Department has concerns about Mr. Altmann's plans for constructing the bridge and the integrity of the bridge once it was constructed. Mr. Altmann was not willing to spend the money to address these concerns unless and until the objections based on the impact on natural scenic beauty are overcome. Accordingly, the engineering concerns were not addressed at the hearing. The reluctance of Mr. Altmann, a private citizen, to incur the expense of the engineering required by the Department is understandable. However, the result is a bifurcated proceeding. For purposes of this decision, it is assumed that it is possible and economically feasible to place a pedestrian bridge at the proposed site which will be safe and stable.

9. The applicant is financially capable of constructing, maintaining, monitoring or removing the structure if it should be found to be in the public interest to do so.

10. The proposed structure, if properly designed, will not reduce the effective flood flow capacity of the White River.

11. If properly designed, the proposed structure will not adversely affect water quality nor will it increase water pollution in the White River.

12. The Department has complied with the procedural requirements of sec. 1.11, Stats., and Chapter 150, Wis. Adm. Code, regarding assessment of environmental impact.

DISCUSSION

The Wisconsin Supreme Court and Court of Appeals have repeatedly held that the enjoyment of natural scenic beauty is a public right. Muench v. Public Service Commission, 261 Wis. 492 (1951), Claflin v. DNR, 58 Wis.2d 182 (1972), Sterlingworth Condominium Assoc. v. DNR, 205 Wis.2d 702 (Ct. App. 1996). In Claflin, the Wisconsin Supreme Court stated:

Specific structures may be determined to be detrimental to the public interest on the ground that they impair natural beauty. This is a proper basis for denial of a permit. The natural beauty of our northern lakes is one of the most precious heritages Wisconsin

citizens enjoy. It is entirely proper that that natural beauty should be protected as against specific structures that may be found to mar that beauty.

58 Wis.2d 182, at 193.

John Altmann has attempted to design a bridge which is aesthetically pleasing and, to the extent possible, one that will have a natural appearance. Mr. Altmann intentionally used a bridge design which is very similar to a bridge which has been constructed in a state park. Michael Goettel, a witness for the Department, defined "natural scenic beauty" as "beauty that is created naturally, in other words, without the influence of man-made intrusions." Although the proposed bridge will have a relatively natural appearance, it is undeniable that the proposed bridge is and will appear to be a man-made structure. The proposed bridge will be visually intrusive to a canoeist or other person in the White River corridor. As such the proposed bridge will negatively impact the natural scenic beauty of the area.

The fact that the proposed bridge will negatively impact the natural scenic beauty of the area, does not necessitate that the application must be denied. A decision on the application requires a balancing of the negative impact on natural scenic beauty with the benefits resulting from the bridge. As found above, the benefits resulting from the construction of the proposed bridge will be realized only by Mr. Altmann and his guests. The proposed bridge will produce no benefits to the general public. The proposed bridge would undoubtedly make Mr. Altmann's access to his property on the west side of the White River more convenient. However, Mr. Altmann does have access to his property on the west side of the river by road. It should also be noted that Mr. Altmann surely was aware of the fact that the White River split the property at the time he purchased it.

With respect to the appearance of the bridge, Mr. Altmann has attempted to have a bridge designed which is aesthetically pleasing. Additionally, because the proposed structure is on a river, as opposed to a lake, it will only be visible to a canoeist for short time. On the other hand, because the bridge will span the river corridor, it will be unavoidably in the view of canoeists travelling this stretch of the river. The proposed bridge will also be in stark contrast to the essentially natural appearance of the corridor. The Department presented as evidence two composite photos (exhs. 42 and 43) which attempt to demonstrate how the bridge will appear at the site. Although some dispute exists whether the photos accurately depict the bridge which Mr. Altmann intends to construct, they do clearly show the impact of a bridge on the natural scenic beauty of the area. In sum, the impairment to natural scenic beauty that would result from the construction of the proposed bridge exceeds the benefits that would result from its construction.

Finally, it should be noted that the record contains evidence that Mr. Altmann is considered a steward of the land and that the Department should consider itself fortunate that he has chosen to preserve the wildness of this land. Although Mr. Altmann should be commended for his decision and efforts to preserve this land, a decision on a chapter 30 permit application can not be made by contrasting a proposed project with other potential development. Such an exercise would be highly speculative and clearly one could always envision an alternative project

or use of the land that would be more detrimental to the public interest than the proposed project. Using this method of analysis no permit application would ever be denied.

CONCLUSIONS OF LAW

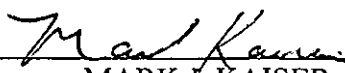
1. The Division of Hearings and Appeals has authority pursuant to secs. 277.43(1)(b) and 30.123, Stats., to hear contested cases and issue necessary orders relating to applications for permits to build bridges across navigable waterways.
2. No person or organization may construct or maintain a bridge in, on or over navigable waters unless a permit has been issued by the DNR. The White River is a "navigable water" within the meaning of sec. 30.123, Stats. The proposed structure constitutes a bridge within the meaning of sec. 30.123, Stats.
3. The proposed bridge will not materially obstruct navigation nor will it adversely affect the flood flow capacity of the White River within the meaning of sec. 30.123(4), Stats.
4. The proposed bridge would negatively impact the natural scenic beauty of the White River at the proposed site and is detrimental to the public interest in navigable waterways. Specific structures may be determined to be "detrimental to the public interest" within the meaning of sec. 30.12(2), Stats. on the ground that they impair natural beauty. Claflin v. DNR, 58 Wis. 2d 182, 206 N.W.2d 392 (1973).
5. The proposed project is a type IV action under sec. NR 150.03(8)(f) 11, Wis. Adm. Code. Type IV actions do not require the preparation of a formal environmental impact assessment.

ORDER

IT IS HEREBY ORDERED that the application of John Altmann for a permit to construct a bridge over the White River is DENIED.

Dated at Madison, Wisconsin on November 23, 1998.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: 
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the *Department of Natural Resources* for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.